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Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of)	MM Docket No. 88-577
)	
LIBERTY PRODUCTIONS,)	File No. BPH-870831MI
A LIMITED PARTNERSHIP)	
)	
Et. Al.)	
)	
For Construction Permit for		
New FM Channel 243A		
Biltmore Forest, North Carolina		

To: The Commission

SUPPLEMENTAL BRIEF

Liberty Productions,
A Limited Partnership
by counsel:

Timothy K. Brady, Esq.
P.O. Box 71309
Newnan, GA 30271-1309
770-252-2620

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SUMMARY

The Initial Decision is unsupported and unreliable, because: (a) it was irredeemably tainted by ALJ's predetermination of the issues prior to hearing; (b) it was premised upon the testimony of the site owner, which was neither reliable nor credible and was characterized by an acknowledged lack of any significant recollection of the relevant events; and (c) it ignored the more detailed and reliable testimony of Liberty's general partner and her corroborating witness, as well as certain relevant testimony of Brian Lee. Accordingly, the Commission must make a de novo determination of the issues, based upon a review of the record evidence.

The record as a whole establishes that, as of the conclusion of her meeting with the site owner August, 1987, Liberty's general partner, Valerie Klemmer, had "obtained sufficient assurance" "to justify" her "belief" that the proposed site would be available at the specified price, if she obtained the construction permit. Accordingly, because Liberty had reasonable assurance in August, 1987, its site certification could not have been false.

Even if there was in fact no meeting of the minds between Ms. Klemmer and the site owner, the record reflects that when they left their meeting with her in August, 1987, both Ms. Klemmer and Mr. Warner believed: (a) that Ms. Klemmer had obtained a verbal commitment to lease a site at a specified rate, if she obtained a

construction permit, and (b) that the this verbal commitment was sufficient to meet the Commission's reasonable assurance standard.

Substantial evidence of intentional deception is an essential prerequisite to a finding of misrepresentation, yet the record not only lacks any substantial evidence of intent to deceive, its is entirely devoid of any such evidence. On the contray, the record reflects clearly that Ms. Klemmer believed that she had obtained "reasonable assurance" of the availability of her proposed site at the time she so certified and Mr. Warner's testimony, which confirms that he had advised her that the understanding she had reached with the site owner was sufficient to support a certification of "reasonable assurance", precludes any possibility that there was any intent to deceive on her part. Accordingly, the false certification issue must be resolved in Liberty's favor.

CONTENTS

I. THE INITIAL DECISION IS UNSUPPORTED AND UNRELIABLE	2
II. LIBERTY HAD REASONABLE ASSURANCE OF ITS SITE IN 1987.	11
III. LIBERTY ADVANCED ITS SITE CERTIFICATION IN GOOD FAITH.	16
IV. SUMMARY.	22

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Liberty Productions, a Limited Partnership ("Liberty") by counsel herewith submits its Supplemental Brief in response to the Order (99I-23), issued by the Assistant General Counsel, Administrative Law Division on November 23, 1999, as follows:

1. When Liberty submitted its above referenced application in 1987, it certified that it had obtained "reasonable assurance" of the availability of its proposed transmitter site from the owner, Vicky Utter ("Utter"). On February 27, 1989 Orion Communications Limited ("Orion") filed a petition to enlarge issues, seeking site availability and false certification issues against Liberty. Liberty opposed the petition and on March 20, 1989, filed a Petition for Leave to Amend, proposing to relocate its transmitter site. On March 29, 1989, the Mass Media Bureau submitted its "Consolidated Comments on Petitions for Leave to Amend" in support of Liberty's Petition for Leave to Amend,

stating its view that Liberty had met the Commission's good cause requirements for the acceptance of the amendment, as well as the Commission's technical requirements. However, by Memorandum Opinion and Order (89M-1025), released March 30, 1989, the presiding administrative law judge, Walter C. Miller (the "ALJ"), added site availability and false certification issues against Liberty and by Memorandum Opinion and Order (89M-1080) released April 5, 1989, he denied Liberty's Petition for Leave to Amend and rejected its amendment.

I. THE INITIAL DECISION IS UNSUPPORTED AND UNRELIABLE.

2. In the context of the above referenced orders, the ALJ provided clear and irrefutable evidence that he had already determined that Liberty had never had reasonable assurance of the availability of its proposed transmitter site and that its certification to the contrary was false. In adding the issues, the ALJ stated:

It's mind boggling how an applicant can represent that they have "reasonable assurance" that a specific piece of property (with precise coordinates) is available when nothing, absolutely nothing, between the landowner and the applicant has been reduced to writing. 89M-1025, released March 30, 1990.

Thus, even as of the date he added the issues, the ALJ had already determined that they would be resolved adversely on the basis that Liberty had no written agreement with the owner of its

proposed site. 1/

3. Subsequently, in denying Liberty's Petition for Leave to Amend and rejecting its amendment, the ALJ stated:

It must be denied because it is based on a faulty premise; namely, that it had a "reasonable assurance" that its original site was available to it. That is inaccurate. Eighteen months ago they made a half-hearted but unsuccessful effort to obtain some of Ms. Vickey Utter's land... The record is clear that there was not then any meeting of the minds between Ms. Utter and Liberty's Ms. Klemmer...Aside from this unsuccessful effort, Liberty did nothing for the next 18 months. They never made any effort to obtain Ms. Utter's authorization...Having failed to obtain a reasonable assurance from Ms. Utter in the first instance, and having never obtained any type of written permission from Ms. Utter to use her land, Liberty cannot argue that it didn't foresee the need to specify a new site. 89M-1080, released April 5, 1989. (emphasis added)

Thus, as of April 5, 1989, the ALJ had already determined that: Liberty's efforts to obtain reasonable assurance had been half-hearted and unsuccessful, there had never been any meeting of the minds between Liberty and the site owner, Liberty had never made any effort to obtain the site owner's authorization and, thus, Liberty never had reasonable assurance of its proposed site and its certification to the contrary was false.

4. Accordingly, it is readily apparent that the ALJ had already determined the outcome of this proceeding, as it related to the issues added against Liberty, from the outset.

1. The ALJ's resolution of the added issues appears to have been substantially influenced by the absence of any written agreement. In addition to his comments in the above referenced orders he emphasized the need for a writing repeatedly during the course of Klemmer's and Warner's testimony. See e.g., Tr. 659-60, 872, 874, 894. The Commission has never imposed such a requirement.

This blatant pre-judging of issues not only denied Liberty the impartial consideration of the evidence to which it was entitled, but clearly undermines any possibility of confidence in the findings and conclusions contained in the Initial Decision (90D-18), released May 4, 1990 ("ID").

5. Having pre-determined the resolution of the issues, the ALJ approached the record evidence by simply ignoring any evidence which did not support his pre-determined conclusions. As a result his findings and conclusions are based upon unreliable testimony and are unsupported by the record as a whole, ignoring as they do substantial evidence to the contrary. Indeed, the only way the ALJ could reach the result he had pre-determined was to rely entirely upon the unreliable testimony of the site owner, who acknowledged that she had little recollection of the relevant events, while ignoring the testimony of Liberty's general partner and its corroborating witness.

6. In reaching his conclusion that Liberty had never possessed reasonable assurance and falsely certified, the ALJ relied upon the unreliable and noncredible testimony of Vicky Utter ("Utter"), the owner of the proposed site, who evidenced and repeatedly acknowledged that she lacked any specific recollection of the events of August, 1987. In so doing the ALJ failed to address or in most instances even to acknowledge the more credible, detailed and reliable testimony of Liberty's general partner, Valerie Klemmer Watts ("Klemmer"). More importantly he completely ignored the significant testimony of

Tim Warner ("Warner"), 2/ a disinterested witness, as well as certain testimony of Brian Lee ("Lee"), a principal of Orion. 3/

7. Warner's testimony was critical to the resolution of the issues, not only because he was a disinterested third party, but because he was an eye witness to and a participant in the discussions which were at issue here. 4/ A reading of his testimony with that of Klemmer discloses no significant conflict, whatsoever. Instead, Warner's testimony completely corroborates that of Klemmer and establishes that Liberty did in fact obtain reasonable assurance of the availability of Utter's property in August, 1987. By contrast the testimony of Utter, upon which the ALJ relied, is the admitted product of a poor recollection and is not credible, given its inconsistent nature.

2. Despite the fact that Warner had given over 150 pages of significant testimony, the ALJ acknowledged his testimony only as it related to three trivial facts, unrelated to whether Liberty possessed reasonable assurance in 1987 and whether it falsely certified: (1) that Utter was unwilling in 1989 to lease to anyone, (2) that Liberty wanted to specify Utter's property because it was the best location and (3) that the coordinates for Liberty's site were one second different from those of Orion's site. ID at paras. 37, 41, 47.

3. For example, the ALJ's found that Utter had never even discussed leasing Liberty a portion of her property. ID at para. 45. In so doing the ALJ not only ignored the testimony of Klemmer and Warner to the contrary, but, likewise, ignored Lee's testimony that Utter had acknowledged to him that she had discussed leasing a site to Klemmer and that she had been willing to do so. (Tr. 2499-2504)

4. The ALJ not only ignored Warner's corroborating testimony, he sought to undermine it. Tr. 887-88
Three times the ALJ sought to trap Warner, through mischaracterization of his prior testimony, into affirming that there had been no current commitment from Utter, when Warner had represented precisely the opposite. Tr. 886, lns 12-14; 887, lns. 21-23; 888, lns. 8-11.

8. Utter's testimony is unreliable, both because it is contradictory and because it is based upon an acknowledged lack of recollection of relevant events. Likewise, Utter's testimony is not credible, because it is inconsistent and because she changed her story once she was placed under oath.

9. Utter acknowledged that her February 22, 1989 Affidavit (Liberty Exhibit 6) was untrue, due to mistaken beliefs she held at the time, resulting from her lack of recollection. (Liberty Exhibit 7; Liberty Ex. 13, pp. 33-35) Utter's unsworn March 29, 1989 statement (Liberty Ex. 8) is also unreliable, inasmuch as its content was influenced by Lee and Orion's attorney, it was unnecessary from Utter's perspective and also because it suggests a more extensive recollection of the relevant facts than she was willing to affirm under oath.

10. Lee testified that he and Orion's attorney advised Utter that another document needed to be prepared and signed for purposes of "clarification," because her previous statements were in "contradiction". (Tr. 2496) However, when pressed to identify the purported "contradiction," Lee was able to point only to the fact that Utter in one instance indicated she had not met Klemmer, while in the second she indicated that she had. (Tr. 2497) Utter testified that her March 29, 1989, statement was prepared after she had received phone calls from both Lee and Orion's attorney, indicating that they wanted her to sign "something to do this all over again". (Liberty Ex. 13, pp. 48-50) Orion's attorney told her what to say and even provided

her with some of the language which was included in the March 29, 1989, statement. (Liberty Ex. 13, pp. 49-50) Utter also candidly acknowledged that from her perspective there was nothing in her March 13, 1989 Statement which she found confusing or contradictory. (Liberty Ex. 13, p. 51) Thus, Utter's unsworn March 29, 1989, statement was a reflection of the influence of Lee and Orion's counsel and served no useful purpose from her perspective. Given these facts and Utter's admission under oath that she had little recollection of her meeting with Klemmer and Warner in August, 1987, the unsworn March 29, 1989 statement, which expresses a significantly greater recollection of the relevant facts than she was willing to affirm under oath, is unreliable. ⁵/

11. Utter's testimony not only reflects a poor recollection of events in August, 1987 and conflicts with the more detailed and reliable testimony of Klemmer and Warner, it also contradicts the testimony of Lee and the explicit terms of his written lease agreement. Utter testified that she first met Lee in 1988 and was certain that Lee was accompanied only by his attorney. (Liberty Ex. 13, pp. 10-11, 19) Lee testified that both a realtor and his attorney accompanied him to Utter's property in August, 1987. (Tr. 2448) Utter repeatedly testified that she and Lee agreed to a 5 year lease, with an option to renew and that

5. It should be noted that at the time Utter executed the March 29, 1989 statement, she was not aware that she would be testifying under oath.

she would be paid \$ 1500 for 5 years whether or not he got the station. (Liberty Ex. 13, pp. 13, 15, 18, 30) Lee, consistent with the terms of the written lease agreement, testified that the agreement was for a 3 year term, with two options to renew at 3 years each. (Orion Ex. 4; Tr. 2463) Utter had no recollection of discussing a rate of \$ 4000.00 and claimed that Lee's lease included a rate of \$ 3000 per year, if a tower is ever constructed. (Liberty Ex. 13, pp. 17-18, 28-29) Of course the written lease agreement specifies a rate of \$ 4000.00, not \$ 3,000.00. (Orion Ex. 4) Thus, Utter not only demonstrated a lack of recollection of the events of August, 1987, she exhibited an unusual lack of recollection of the terms of a current lease agreement for which she was currently receiving compensation. (Liberty Ex. 13, pp. 30-31)

12. In her deposition testimony Utter not only evidenced, but candidly acknowledged that she lacked any significant recollection of her discussion with Warner and Klemmer in August, 1987. (Liberty Ex. 13, pp. 25-30, 40-44) In fact the only matter she recalled discussing with them was her lease agreement with Brian Lee. (Liberty Ex. 13, pp. 25-27, 41-42) ⁶/ However, both Warner and Klemmer were consistent and clear in testifying that at no time did Utter mention either Lee or any outstanding

6. This story may have been the product of Utter's lack of recollection or it may have been fabricated to pacify Lee, who had expressed concerns to Utter about the fact that she had discussed leasing a site to Klemmer and had suggested that she may have been attempting to lease the same site to two people. (Tr. 928-29)

agreement relating to any tower site, other than the Channel 16 tower. (Tr. 659, 676-77, 679, 809, 876-77, 915, 940-42)

Utter was unwilling to testify under oath regarding any specific fact without a significant degree of qualification. This is understandable, given the fact that her deposition testimony suggests that she has little, if any, recollection of the events of August, 1987, as they relate to her meeting with Klemmer and Warner or even her dealings with Lee. As such, her deposition testimony (Liberty Ex. 13) is unreliable and insufficient to support any findings or conclusions.

13. Utter's testimony also lacks credibility because of its inconsistent nature, evidenced by the significant change in her story, once she was placed under oath. Thus, Utter acknowledged to Klemmer and Warner in 1989 that she recalled meeting with them in 1987 and did not once deny that she had agreed at that time to lease a portion of her property to Klemmer for a transmitter site, if she obtained the construction permit. (Tr. 912, 919-20, 927) Utter also acknowledged in her March 13, 1989 Statement that she had in August, 1987 discussed leasing a portion of her property to Klemmer as a transmitter site. (Liberty Exhibit 7) Lee testified that Utter acknowledged to him that: she had met with Klemmer and Warner in August, 1987, had discussed leasing a site to Klemmer and that she had expected to hear from Klemmer again and had not and, thus, had forgotten the meeting. (Tr. 2499-2500) Utter advised Lee that she had had no qualms about entering into a lease with Klemmer for a different portion of her

property and had not excluded anyone else from entering into agreements with her on the basis of his lease. (Tr. 2500-02)

14. However, Utter changed her testimony at the time of her deposition, claiming she could recall no discussion, whatsoever, regarding leasing a portion of her property to Klemmer. (Liberty Ex. 13, pp. 26-27) She claimed that she had made reference to such a discussion in her March 13, 1989 Statement, only because Warner was adamant that such a discussion had occurred. (Liberty Ex. 13, pp. 40-41). Her testimony is not credible, however, inasmuch as it is contradicted not only by the testimony of Klemmer and Warner, but also by the testimony of Lee. (See para. 13, supra.) ⁷/ The most likely explanation for Utter's having changed her story is that her recollection of the events of August, 1987 is so poor that she has little, if any, recollection of what occurred. As such, her testimony is not credible and is insufficient to provide any sufficient basis for the adverse resolution of the added issues. ⁸/

15. The record as a whole reflects that the testimony of Utter, upon which the ALJ based his findings and conclusions, is neither reliable nor credible. Both the untrustworthy nature of

7. While Warner refused to characterized Utter as a liar, he was clear in his testimony that she was wrong in her recollection of the facts. (Tr. 894) Utter in turn acknowledged that, other than for the fact that she had no recollection of the discussions at issue, she had no reason to believe that Warner was not telling the truth. (Liberty Ex. 13, p. 44)

8. Also relevant to the lack of credibility of Utter's testimony is her failure to appear at hearing, despite having been properly served with a subpoena, and the fact that the ALJ engaged in ex parte communications with her. (Tr. 650, 1067-68)

Utter's testimony and its lack of credibility appear to be the product of an absence of any significant recollection on her part of the relevant events. Unlike Utter's testimony, the testimony of both Klemmer and Warner is reliable and credible. Their testimony, which the ALJ improperly ignored, clearly demonstrates that Liberty had reasonable assurance at the time its application was filed. Therefore the ID is untrustworthy, not only because it was irredeemably tainted by ALJ's predetermination of the issues, but because of his exclusive reliance upon Utter's testimony and refusal to consider the more detailed and reliable testimony of Liberty's corroborating witness. Section 706 of the Administrative Procedures Act requires that decisions in adjudicatory proceedings be supported by substantial evidence, based upon the record as a whole. 5 USC 706. The findings and conclusions contained in the ID do not come close to meeting this requirement. Accordingly, the Commission must make a de novo determination of the issues, based upon a review of the record evidence. See: Liberty Exhibits 3-4, 6-8, 13; Orion Exhibit 4; Tr. 651-687, 711-13, 808-13, 823-982; 2444-2518.

II. LIBERTY HAD REASONABLE ASSURANCE OF ITS SITE IN 1987.

16. It is axiomatic that if Liberty had reasonable assurance of the availability of its proposed site in August, 1987, its site certification could not have been false. It is well established that an applicant need not have a binding agreement or absolute assurance of the availability of its proposed site, but only reasonable assurance that the site will be available.

Marvin C. Hanz, 21 FCC2d 420, 423 (RB 1970) In establishing its site certification procedures in 1985 the Commission indicated:

Commission requirements will be satisfied when an applicant has contacted the property owner or owner's agent and has obtained reasonable assurance in good faith that the proposed site will be available for the intended purpose. Processing of FM and TV Broadcasting Applications, 58 RR2d 776, 782 (1985). (emphasis added)

In National Innovative Programming Network, Inc., 2 FCC Rcd. 5641, 5643 (1987) the Commission held that reasonable assurance need not be based on written assurances, but can be obtained informally, even through a third party, provided some indication of the property owner's favorable disposition toward making an arrangement with the applicant is obtained, and that the details of the arrangement can be left for later negotiation:

We have long held that a broadcast applicant need not have a binding agreement or absolute assurance of a proposed site. What an applicant must show...is that it has obtained reasonable assurance that its proposed site is available, with some indication of the property owner's favorable disposition toward making an arrangement with the applicant, beyond a mere possibility...This reasonable assurance may be acquired by informal contacts by counsel for the applicant, and rent and other details may be negotiated at a yet undetermined future date.

Thus, "reasonable assurance is not a high standard, but a relatively low standard. The site owner's response must only be "sufficient" to "justify" the applicant's good faith "belief" that the site will be available. Puopolo Communications, Inc., 60 RR2d 964 966 (RB 1986) The issue of whether Liberty had reasonable assurance in August, 1987, must be analyzed in light of the record as a whole and the foregoing requirements.

17. The record as a whole establishes conclusively that the requirements for reasonable assurance were met in this instance. Klemmer went with Warner to Utter's home and indicated her interest in leasing a portion of Utter's property for use as a transmitter site, if she obtained the construction permit. (Liberty Ex. 3; Tr. 651-54, 670-72, 674-676, 854-56, 869-70, 872) In response, Utter advised Klemmer that she would be willing to lease the site to Klemmer, provided she was willing to pay \$4000.00 per year. (Liberty Ex. 3; Tr. 656-57, 667, 675-77, 681, 877-880, 889-90, 892, 898, 960-62) Klemmer advised Utter that the proposed rate would be acceptable. (Liberty Ex. 3; Tr. 657, 675, 880, 890, 892, 961)

18. They also discussed where the tower would be located. Warner suggested it be located near the existing tower. (Tr. 662-65, 811-12, 881-83) Utter agreed, indicating that it should be located as close to the existing tower as possible. (Tr. 678, 811-12, 881-83, 900) Thus, when Warner marked the site on a map for Klemmer, he placed it as close to the exiting tower as reasonably possible. (Tr. 901-03) They also discussed the height of the tower and that it would be a free-standing tower. (Tr. 955)

19. While there was no specific discussion of the number of years for the proposed lease, Warner made it clear to Utter that Klemmer was interested in a lease similar to the one which Utter currently had in effect for the Channel 16 tower, which was a multi-year lease. (Tr. 890-92, 963) Utter was experienced with

respect to broadcast tower leases. (Liberty Ex. 4; Tr. 656-59, 681, 848-49, 884-88)

20. When Klemmer and Warner met with Utter in 1989, she did not deny that she had agreed in 1987 to lease Klemmer a site. (Tr. 912, 919-20, 927) She also acknowledged to Lee that she had discussed leasing a site to Klemmer and had been willing to do so. (Tr. 2499-2504) While Utter indicated in 1989 that she had "assumed" that Klemmer would have gotten back to her, if she was interested (See: Liberty Ex. 7), both Klemmer and Warner testified that the understanding reached in August, 1987 was that a lease would be entered into, if and only if, Klemmer was the successful applicant and that all three of them understood and discussed their understanding of the fact that it would most likely be 18 months to 2 years before this occurred. (Liberty Ex. 3; Tr. 661, 665-66, 680, 682, 883-86, 893 897) Utter at no time communicated any expectation that Klemmer would get back to her earlier. (Tr. 666, 897-99) Utter acknowledged that she was aware at the time she signed a lease with Lee that there would be other applicants, that it would be some time before the process was complete, and that it was possible that Lee might not be the successful applicant. (Liberty Ex. 13, pp. 12-14, 30-31) Lee confirmed that this was discussed with Utter. (Tr. 2464, 2475)

21. Utter did not suggest that a current lease be entered into, she did not suggest that a written agreement be prepared and executed, and she did not request any monetary compensation, prior to the commencement of the lease. (Liberty Ex. 3; Tr.

666-67, 898-99) Likewise, the lease Utter executed with Lee was his idea; she never suggested entering a current lease or even into any written agreement and gave Lee no indication she was not willing to wait to see whether he got the construction permit. (Liberty Ex. 13, pp. 15-18, 31)

22. The foregoing facts establish that, as of the conclusion of her meeting with Utter in August, 1987, Klemmer had "obtained sufficient assurance" "to justify" her "belief" that the proposed site would be available at the specified price, if she obtained the construction permit. ⁹/ Utter had represented that she was favorably disposed to making a site available, an annual rental rate had been discussed and agreed to, the general location of the tower had been agreed to and an understanding existed that a written lease would be entered into at such time as Klemmer might obtain a construction permit. While there may have been some misunderstanding regarding when Utter expected Klemmer to get back in touch with her, that fact would not obviate the existence of reasonable assurance. ¹⁰/ Absolute assurance was not required, only the favorable disposition of the site owner and

9. Whether or not there was a meeting of the minds depends on Utter's state of mind in August, 1987, not her state of mind in 1989, when she retained little recollection of the events of August, 1987, had decided against any further leasing of her property, was under pressure from Lee and was having her testimony influenced by Lee and Orion's counsel. See paras. 10, 12; Note 6. supra.

10. The Commission has recognized that some ambiguity and misunderstanding might be expected to result from the dealings between a property owner and an applicant, due to the interplay of their competing interests. Professional Radio, Inc., 103 FCC2d 429, 437 (RB 1986)

some understanding of the terms under which the site would be made available, all of which were present here.

Accordingly, because Liberty had reasonable assurance in August, 1987, its site certification was not false and showed good cause for the acceptance of the site relocation amendment it filed in 1989, as the Mass Media Bureau concluded. See: para. 1, supra.

III. LIBERTY ADVANCED ITS SITE CERTIFICATION IN GOOD FAITH.

23. Regardless of whether or not Liberty had reasonable assurance of the availability of its proposed transmitter site, the record in this proceeding is entirely devoid of any evidence that Liberty misrepresented its availability. On the contrary the record requires the opposite conclusion: that Klemmer acted in good faith and reasonably relied upon her meeting with and what she understood to be agreement with the site owner, as well as the assistance and advice of an experienced broadcaster, in certifying that Liberty had reasonable assurance of its proposed site.

24. It is well established that in order to support a finding of false certification or misrepresentation, the record must reflect substantial evidence of a deliberate intention to deceive the Commission. Armando Garcia, 3 FCC Rcd. 1065, 1067 (RB 1988) (substantial evidence of deceptive intent is the sine qua non of a misrepresentation issue); accord Fox River Broadcasting, Inc., 93 FCC2d 127, 129 (1983); Kaye-Smith Enterprises, 71 FCC2d 1402, 1415 (1979). In the absence of any evidence, much less substantial evidence, that Liberty or its principals have engaged

in any intentional deception, the false certification issue specified against Liberty must be resolved in its favor.¹¹/

25. Regardless of whether or not there was a meeting of the minds, the record is clear that at the conclusion of their August, 1987 meeting with Utter, both Klemmer and Warner believed that they had reached sufficient agreement with Utter to meet the limited requirements for reasonable assurance. There certainly was no intent to deceive the Commission and, thus, no false certification.

26. The record reflects that when she met with Utter in August, 1987, Klemmer had no prior familiarity with the concept of "reasonable assurance" and relied upon information provided to her by Warner and her attorney. (Tr. 653, 672) She had been advised by both Warner and her attorney that what she needed to obtain from Utter was "reasonable assurance" that she would be willing to lease the site, if Klemmer was the prevailing applicant. (Tr. 652-653) Klemmer understood that she would have obtained "reasonable assurance", if she were able to reach an understanding with Utter that Utter would be willing to lease the site to her, if she obtained a construction permit. (Tr. 653) Klemmer was not advised that it was necessary to firm up any specific terms of the agreement other than the amount of the rent in order to obtain "reasonable assurance". (Tr. 672) Instead,

11. Given the absence of any such evidence, the false certification issue was improperly sought by Orion and should never have been added by the ALJ.

Klemmer understood that if she and Utter could agree that Utter would lease her the site, if Klemmer got the construction permit, that would constitute "reasonable assurance" and the only other term of the agreement that she needed to "firm up" at that time was the amount Utter would be charging for rent. (Tr. 673) She understood that no written agreement was necessary for there to be "reasonable assurance". (Tr. 660, 673, 680) She also had been advised by Warner that Utter had a reputation for honoring verbal agreements and could be relied upon. (Tr. 659-660, 681) Klemmer left her meeting with Utter in August, 1987 with the clear understanding that Utter had agreed to lease her a transmitter site for \$ 4000.00 per year in the event she was successful in obtaining a construction permit. (Liberty Ex. 3, p. 3)

27. Warner acknowledged that he discussed the concept of reasonable assurance with Klemmer both prior and subsequent to the meeting with Utter in August, 1987. (Tr. 872-73, 875) He also advised Klemmer of his knowledge of Utter's prior dealings and reputation for honoring verbal agreements. (Tr. 875, 900)

28. Warner affirmed repeatedly that Utter advised Klemmer in his presence that she would lease the site to her for \$ 4000.00 per year in the event she was the successful applicant. (Liberty Ex. 4, pp. 3-4; Tr. 889-93, 899, 960-63) He believed that Klemmer had obtained a commitment from Utter in August, 1987 that met the Commission's "reasonable assurance" standard and was sufficient to support a certification of "reasonable assurance"

and he so advised Klemmer. (Tr. 900, 906) Warner's advice was based upon information he had obtained from WCQS' communications attorneys with respect to the four transmitter sites he had obtained for WCQS. (Tr. 872-73, 906)

29. With regard to the lack of any need for a written agreement, Warner's advice was also based upon practical experience. During the time Warner had been employed at WCQS, he had been involved in the acquisition of four different transmitter sites with respect to which applications were filed and site certifications executed. (Tr. 825, 952) In two of these instances, he had personally executed the site certification. (Tr. 952-53) In only one of these four instances was a written agreement executed with the site owner/agent prior to the submission of the application. (Tr. 826-29) A written agreement was sought in that case because they were seeking funding from a source that required a written site agreement. (Tr. 976) While each of the verbal agreements which WCQS entered into with site owners was honored, the written agreement was not. (Tr. 826-29)

30. With regard to Warner's advice that an oral agreement with Utter could be relied upon Warner testified that Utter had consistently honored verbal agreements in the past. (Tr. 899-900) He had no basis for believing in August, 1987 that she would not honor the agreement she reached with Klemmer and, thus, felt entirely comfortable with the verbal nature of the agreement. (Tr. 899-900)

31. Thus, the record reflects that when they left their meeting with Utter in August, 1987, both Klemmer and Warner believed: (a) that Klemmer had obtained a verbal commitment to lease a site at a specified rate, if she obtained a construction permit, and (b) that this verbal commitment was sufficient to meet the Commission's reasonable assurance standard. Thus, regardless of whether or not there was in fact a meeting of the minds with Utter, the record is clear that both Klemmer and Warner believed that commitment to lease at a specified price had been obtained.

32. The record further reflects that the commitment which both Klemmer and Warner believed she had obtained from Utter in August, 1987 was more than sufficient to meet the Commission's reasonable assurance standard, as Klemmer understood those requirements. See: para. 26, supra. Thus, in certifying that she had obtained reasonable assurance, Klemmer did so in good faith, believing that she had in fact met the standard. Thus, regardless of whether or not Klemmer in fact possessed reasonable assurance of the site in August, 1987, she clearly believed that she did and so certified in good faith. ^{12/}

33. As discussed above, a finding of false certification or misrepresentation may properly be made only upon substantial

12. Just as the existence or nonexistence of a meeting of the minds was dependent upon Utter's state of mind in August, 1987 (See: Note 9, supra.), the resolution of the certification issue is entirely dependent upon Klemmer's state of mind in August, 1987. It was her understanding in 1987 of what "reasonable assurance" meant that determines the veracity of her certification, not the ALJ's understanding.

evidence of intent to deceive. Here, there not only is no substantial evidence of intent to deceive, the record is entirely devoid of any such evidence. Instead, the record reflects clearly that Klemmer believed that she had obtained "reasonable assurance" of the availability of her proposed site at the time she so certified. Indeed, Warner's testimony, which confirms that he had advised Klemmer that the understanding she had reached with Utter was sufficient to support a certification of "reasonable assurance", precludes any possibility that there was any intent to deceive on her part. ¹³/

34. The ALJ's conclusion (ID at para. 8) that Klemmer knew she did not possess reasonable assurance and "blatantly dissembled" in certifying that she did not only is entirely unsupported by the record, it is not even supported by the ALJ's own proposed findings, which fail to reflect any evidence of intent to deceive. ¹⁴/ Rather than arising from an objective and

13. Neither the ALJ nor any of Liberty's competitors has offered even a shred of evidence that Warner's testimony was untrustworthy or lacked credibility in any respect. Indeed, the ALJ was unable to credibly address Warner's testimony and had to ignore it in order to reach his predetermined result. The reason of course is that, if Warner's testimony is truthful, then Klemmer not only did not falsely certify, she did in fact obtain reasonable assurance of the availability of Liberty's proposed site in August, 1987.

14. These conclusions were based upon nothing more than speculation and surmise, reflected in the ALJ's unsupported imaginings as to what "appears to have happened." ID at para. 50. Not only were they speculative, they were contradicted by the ALJ's own finding that Utter never had any discussion with Klemmer regarding leasing Klemmer a site. ID at 45. Contrary to the ALJ's speculations, the record reflects that Klemmer did not fail to meet any requirement imposed by Utter and that Utter did not request any compensation or suggest entering into a current lease or other written agreement. (Tr. 666-67, 898-99)

impartial review of the record, the ALJ's conclusions arise from his pre-determination of the issues prior to hearing, reliance upon unreliable and noncredible testimony, as well as his total lack of intellectual integrity in simply ignoring any evidence that did not fit his predetermined outcome.

IV. SUMMARY.

35. The only issue remaining for resolution in this proceeding is the false certification added pursuant to 89M-1025, released March 30, 1989, as follows:

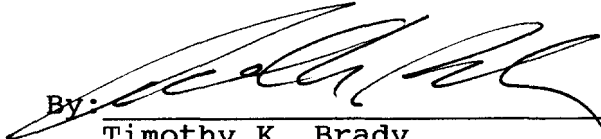
To determine whether Liberty has made misrepresentations to the Commission about the proposed transmitter site's availability, and, if so, what impact that has on Liberty's basic qualifications to be a Commission licensee.

The record as a whole reflects that Klemmer obtained reasonable assurance, as the Commission defines that concept, prior to filing Liberty's application in August, 1987 and, thus, her certification was not only made in good faith, it was also accurate. However, even if there was no meeting of the minds with the site owner in August, 1987, the record as a whole reflects that both Warner and Klemmer believed that they had reached an agreement with Utter sufficient to meet the FCC's reasonable assurance standard and, thus, Klemmer advanced her certification of site availability in good faith. Accordingly, in light of the foregoing and in the absence of any evidence of any intentional deception the above referenced issue should be

resolved in Liberty's favor.

Respectfully Submitted

LIBERTY PRODUCTIONS,
A LIMITED PARTNERSHIP

By: 
Timothy K. Brady
Its Attorney

P.O. Box 71309
Newnan, GA 30271-1309
770-252-2620

December 23, 1999

CERTIFICATE OF SERVICE

I, Timothy K. Brady, hereby certify that I have this 23rd
day of December, 1999, served a copy of the foregoing
Supplemental Brief by First Class mail, postage prepaid upon the
following:

John Riffer, Esq.
Associate General Counsel
FCC
445 12th Street, SW
Washington, DC 20554

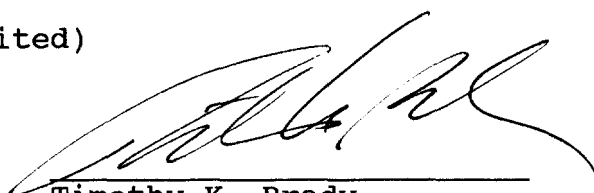
James W. Shook, Esq.
Enforcement Bureau
FCC
445 12th Street, SW
Washington, DC 20554

Donald J. Evans, Esq.
Donelan, Cleary, et. al.
1100 New York Avenue, N.W. Suite 750
Washington, D.C. 20005-3934
(Counsel for Biltmore Forest
Broadcasting FM, Inc.)

Stephen T. Yelverton, Esq.
601 Thirteenth Street, NW
Suite 500 North
Washington, DC 20005
(Counsel for Willsyr Communications
Limited Partnership)

Robert A. DePont, Esq.
P.O. Box 386
Annapolis, MD 21404
(Counsel for Skyland Broadcasting Co.)

Lee J. Peltzman, Esq.
Shainis and Peltzman
1901 L Street, NW, Suite 290
Washington, DC 20036
(Counsel for Orion Communications Limited)


Timothy K. Brady